No. 14,630

In the

United States Court of Appeals

For the Ninth Circuit

LOUIS P. LUTFY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Reply Brief

Upon Appeal from the United States District Court for the District of Arizona

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Introductory Statement.

Counsel for the Government in the Brief for Appellee have devoted the major portion of said brief to an appendix beginning on page 16 thereof and ending on page 39, containing a transcript of the court's instructions to the jury. Bearing in mind that the appellant has not taken exception to the court's instructions and has predicated no contention of error and no argument upon any portion of these instructions, it does not appear that they are relevant. As pointed out on page 14 of appellee's brief, the theory upon which

the court's instructions to the jury were included in the form of an appendix to the brief is that since the instructions of the court were fair to the appellant, it must necessarily follow that appellant was accorded a fair and impartial trial. The lack of logic in this deduction is fully answered in the Brief for Appellant (26-42). The conduct of the trial and the instructions to the jury are separate functions of the court, and it is patent that one or the other of these functions may be performed by the court to perfection while the other may be replete with imperfections. The absence of criticism of the court's instructions to the jury on the part of appellant makes the appendix mere surplusage and does not necessarily establish that defendant was in all particulars afforded a fair and impartial trial according to law.

The body of appellee's brief (4-14) contains a paucity of citations of authority aside from those discussed in the Brief for Appellant and is largely confined to a brief statement of certain facts and inferences which the Government contends are present in the record of the trial of the cause.

It does not appear to counsel for the appellant that the arguments advanced in appellant's brief have been squarely met or that any substantial authority has been advanced in answer to appellant's criticism of the conduct of the trial. These matters are hereinafer briefly adverted to.

ARGUMENT

I. Net Worth Proof.

(a) Appellee's answer to the contention, as shown by the proof, respecting a sum in excess of $18,000.00 in cash which appellant admittedly had shortly prior to the beginning of the prosecution period, is to point out that accord-

ing to the Government's figures appellant had a net worth on December 31, 1945 of $58,337.20, and that in 1944 and 1945 he had purchased six parcels of real estate upon which no *mortgages* were outstanding as of December 31, 1945, and the purchase price of which parcels of real estate was $29,548.74. The Government assumes that this sum accounts for the more than $18,000.00 in cash which appellant previously had.

The foregoing is a sheer assumption and must be characterized as speculation, not proof. Moreover, the absence of *mortgages* does not necessarily establish that property has been paid for in full.

(b) With respect to the argument under (b) beginning on page 5 of the brief of appellee, the only comment that is appropriate is that it discloses the Government's theory that under the net worth method of procedure the burden of proof is shifted to the accused to prove his innocence. Thus is pointed up one of the dangers to the rights of the accused inherent in the net worth method of proof.

(c) Beginning at page 6 of the Brief for Appellee is a discussion of the books and records of appellant and the suggestion, drawn from the *Holland* case, that his books were a set of blinkers to deceive the Government. Yet, as pointed out on page 22 of the Brief for Appellant, it was the Government's evidence that established the accuracy and completeness of appellant's books and records (98, 100, 111, 113, 115, 126). At the top of page 7 of appellee's brief, notwithstanding its own evidence to the contrary, it undertakes, by selecting out of context one question and answer during cross-examination of appellant's witness Moser, to establish that appellant's records did not reflect his true income. This same witness testified that appellant's books

and records were of average quality for accuracy and completeness (336, 337). Admittedly there were, of course, a small number of errors. Out of 3891 cash transactions during the year 1948 there were 14 instances in which the transactions, although recorded on the cards of appellant's patients, were not recorded in the log book kept by appellant, the same being typical of the margin of error to be expected in the most carefully kept books of any business or profession (434).

(d) Appellant must take issue with appellee's statements about the evidence contained on pages 7 and 8 of the Brief for Appellee, and particularly the following statement:

> "The Appellant had previously told Internal Revenue Agents that he had received no loans other than the loan from Northwest Mutual Life Insurance Company (241)."

An examination of the transcript at this point discloses that the conversation, as related by Government witness Whitsett, was that pertaining to loans or gifts from members of appellant's wife's family and particularly Mrs. Linsenmeyer, and the particular question and answer was as follows:

> "Q. This is the first you have heard? Then I take it you did not make any such allowance. Now, did you make any allowance in the computation of either Exhibits 33 or 34 of a loan made to Dr. Lutfy in the general vicinity of September 18, 1947, by Mrs. Linsenmeyer in the sum of either $3200 or $3500, and which has never been repaid?
>
> A. No, because I asked the doctor if there were any other loans and he said that was all."

Appellant must also take issue with the following statement beginning at the bottom of page 7 of appellee's brief:

"Mrs. Lutfy stated that there were no loans obtained against these policies nor were any policies surrendered (309, 310)."

The exact language is as follows (Cross-examination of Bertha A. Lutfy by Assistant United States Attorney):

"Q. I believe you were questioned whether your husband had any life insurance policies prior to 1945?

A. Yes.

Q. To your knowledge were these policies ever cashed or did he make any loans from the company?

A. He made loans on them, yes.

Q. This loan you were talking about—

A. All I can say, he borrowed from life insurance companies.

Q. Is that approximately twelve or fifteen thousand dollars loan, is that the one you are talking about now?

A. That is from an insurance company.

Q. Prior to 1945 do you recall whether he received any specific amounts from loans from insurance companies or from surrendering any of those policies?

A. I don't believe so.

Q. With the exception of that, I have forgotten if it is twelve or fourteen or fifteen thousand dollar loan, with the exception of that, do you recall any other loans he made from life insurance companies?

A. During that year, I don't believe so.

Q. Now, as far as you know, did he cash any of these life insurance policies in, surrender them, during this period, '46, '47, and '48?

A. I don't think so. I am not sure."

It is submitted that the foregoing evidence, when examined verbatim, does not contain all of the elements claimed for it by appellee.

(e) Counsel for appellee at least tacitly concedes that

the Government did not in fact rely upon the net worth evidence for conviction in this case:

> "It should be pointed out that while the Government proceeded under the net worth theory in the present case, it also relied upon specific items. Some of these were excess evaluation of real estate for depreciation purposes, claiming personal expenditures as business expenses, claiming business expenditures as business expenses and capitalizing the same for depreciation thereby gaining a double deduction, and treating short-term capital gains as long-term. . . . By proving these specific items, the Government did not entirely rely upon the evidence of net worth increases and expenditures in excess of reported income, but adduced substantial independent evidence of the crime of income tax evasion." (Appellee's brief 8, 9.)

The foregoing statement points up as nothing else could the vice of the net worth evidence in this case. Actually, it was not a case in which the Government needed to resort to the net worth method. Counsel for the Government in the foregoing statement appears to tacitly concede that the conviction of this appellant was predicated upon specific items. Yet in such a case the great mass of evidence admitted under the net worth theory has an inescapable tendency to so prejudice the jury, or to confuse its members, as to preclude a successful defense by the accused, however innocent, and this appears to be one facet of the dangers which Mr. Justice Clark so aptly expressed with respect to the net worth method in the *Holland* case (Brief for Appellant 16, 17, 18, 19).

Also, the foregoing statement of counsel for appellee presents an opportune occasion to compare the specific items upon which it is suggested this conviction rests with the

text of the Government's reply to defendant's motion for further particulars (T. R. 20-22).

II. Variance from Bill of Particulars.

Counsel for appellant has contended and persists in the contention, as set forth in Brief for Appellant (24-25), that the evidence admitted over objection concerning the computation of depreciation on capital assets during the prosecution period, evidence respecting business expenditures as business expenses, and evidence seeking to treat as ordinary income certain capital gains attributed to appellant, were entirely outside the scope of the Government's bill of particulars and any and all amendments thereto (R. T. 11-14, 16, 20-22), and should have been excluded.

Nothing in the Government's specifications indicated that the Government intended to show that depreciation reserves were improperly computed. While it is true that appellant might have continued filing motions for bills of particulars and further particulars, there was no way that appellant could know what was in the minds of Government attorneys, and therefore, upon being furnished with certain specifications would naturally conclude that such specifications were complete. It is conceded that the Government's particulars were confusing but principally for the reason that the Government constantly shifted its position and its theory of the case. Otherwise, appellant could certainly assume with confidence that the Government had set forth specifically and with clarity the field of intended proof. The Government had been given at least three opportunities to do so, and when, for the first time on the trial of the case, it was found that the Government's attorneys had other intentions in mind, appellant was completely taken by surprise and

compelled to defend as best he might on the spur of the moment.

The case of *Berger v. U. S.*, 295 U.S. 78 (Brief of Appellee page 11), involves mainly a situation where an indictment charged a conspiracy against several persons and the proof went only to some but not all of the persons named. The decision of the Court holding that there was no fatal variance between the proof and the charge did not deal specifically with a bill of particulars. In discussing the question of variance between indictment and proof, the Court said:

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected from another prosecution for the same offense."

In *Goldbaum v. U. S.* (C.C.A. 9th), 204 F.2d 74 (Brief of Appellee 11), the bill of particulars said merely:

> "The gross receipts figure of $3,685,469.75 for 1949 alleged in count thirteen of the indictment was derived from the books and records of the Golden News Service (Flamingo Commissioners)".

This Court at page 78, referring to the bill of particulars, said:

> "Actually it is apparent that it says practically nothing except that the figure referred to was derived from the books and records of the Golden News Service * * *. We think it did not in fact limit the character of the admissable proof under the original count."

Thus, it is apparent that the above case is not helpful in the case at bar and provides no solution to the problem arising where the Government seeks to go outside of the bill of particulars after having furnished what appeared to be a specific bill.

The case of *Smiley v. U. S.* (C.C.A. 9th), 186 F.2d 903 (Brief for Appellee 11), does not involve a bill of particulars at all. Appellant was charged with fraudulently representing himself as a citizen of the United States to a Deputy Sheriff of Los Angeles County, one Sui, whereas, the proof showed that while Sui was present most of the time while appellant was being booked by the deputies, the representation of citizenship was actually made to Deputy Hopkins. This Court held that such proof did not create a fatal variance, and at page 905 said:

> "* * * The evidence at the trial was in part documentary. It is of such character as to firmly peg the crime charged to the circumstances of time and place and persons present in such a manner as to fully protect appellant against another prosecution for the same offense. He would have no difficulty were another prosecution attempted in showing former jeopardy."

In connection with the problem here under discussion, the case of *Bryan v. U. S.* (C.C.A. 5th), 175 F.2d 223 (Brief of Appellee 12), has some relevancy. This case involved the same charge as in the case at bar, and the holding of the court, generally stated, is that mere proof of expenditures in excess of reported gross income during the prosecution years is not sufficient to sustain a conviction. The court also held that the proof is limited to the scope of the bill of particulars, saying at page 224:

> "Two bills of particulars filed by the United States Attorney limit the alleged evasions to understatements

> of the gross receipts derived from the business operated by appellant in each of the years. No claim is made that the deductions from the income tax returns of the appellant were unallowable, fictitious, or false. Measured, as the proof must be, by these bills of particulars, the conviction must stand or fall upon the proof, or lack of proof, of false statements knowingly made for the purpose of evading income taxes in the returns of gross business receipts for the years in question."

Therefore, notwithstanding appellee's argument to the contrary, appellant contends that reversible error was committed by the district court in overruling timely objections to evidence manifestly outside of the specifications of the bill of particulars, and that under the bill of particulars as filed the only deductions subject to challenge were "all nondeductible personal expenses taken as business deductions * * *"

III. Prejudicial Testimony of Government Witnesses Herre, Fairfield and Whitsett.

With respect to the witness Herre, appellee argues (Brief for Appellee 13) that the court sustained the defendant's objections to this hearsay testimony and instructed the jury to disregard the answer of the witness. However, in this connection reference to Brief for Appellant (27-31) and Transcript of Record (71-77) shows clearly that as must surely have been known to the attorneys for the Government, this witness was incapable of testifying to any relevant fact in the case. The whole of his testimony was by the most elementary rules of evidence incompetent and improper. Notwithstanding this fact, he was put forward as a Government witness under circumstances where neither the court nor appellant's counsel would suspect

that his testimony was wholly incompetent. Thus, notwithstanding frequent objections from appellant's counsel, he testified at some length before his sojourn on the witness stand was finally terminated. It would indeed be naive to assume that a mere instruction of the court to the jury to disregard one answer of the many answers he gave would be sufficient to eliminate the prejudice thereby created.

Counsel for the Government makes no answer at all to the discussion of the testimony of the Government's witness John L. Fairfield on page 31 of appellant's brief.

With respect to the witness Whitsett, attorneys for appellee contend that he was justified in his broadcast of personal opinions upon the ground that he was "an expert in his field", and as a further ground for his conduct says "His manner and demeanor were of course under the close scrutiny of the jury throughout his testimony" (Brief for Appellee 13).

The final reason offered by appellee in justification of the conduct of this Government witness-employee is the inclusion of the court's instructions to the jury. Counsel for appellee apparently feels that since the instructions to the jury given by the district judge were not challenged that the conduct of the witness Whitsett is thereby rendered of no consequence. With this conclusion counsel for appellant must take sharp issue. Reference is made to Appellant's Brief, pages 31-42, for examples of the manner in which this witness by every known subtlety at his command most obviously sought to prejudice the trial jury against the appellant. It is submitted that there was no way that appellant could protect himself in advance against the insinuations and opinions of this long-time Government employee, nor, in fact, could the court have effectively, by any instruction to the jury, obviated the result produced. Counsel for

appellee does not in the brief contend that the witness Whitsett did not infiltrate his answers with his own opinions or repeatedly suggest inferences adverse to the appellant, but merely seeks to excuse them as hereinabove set forth. The writer is of the belief that agents of the Internal Revenue Service are morally bound to refrain from such tactics. The ethics of the situation are plain. The impact upon the jury incalculable. If the plain unvarnished factual material of the case will not alone produce a conviction, no conviction should be had. As long as the courts permit convictions to stand which have plainly been influenced by such carefully prepared subtleties, Revenue agents who become witnesses in such cases will have no reason to discontinue the employment of personal opinion, insinuation, innuendo and such in phrasing their answers to questions which call only for facts.

This situation is further accentuated by the practice of turning the witness loose to deliver a carefully prepared discourse without interrogation. This practice is complained of in this appeal, but brought no response from the appellee (Brief for Appellant 37-38).

CONCLUSION

Appellant sincerely believes and therefore urges the court that the admonitory rules set forth in *Holland v. U. S.*, 99 L. Ed. 127, require the reversal of the conviction of this appellant.

Respectfully submitted.

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